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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2010-0846; FRL-9698-3]**

# **Stay of the Effectiveness of Requirements; Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is granting an administrative stay of the final rule titled “Approval and Promulgation of Implementation Plans; New Mexico; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determination” under the authority of the Administrative Procedure Act (APA) for 90 days. Today’s action reflects this stay in the Code of Federal Regulations.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. 40 CFR 52.1628 is stayed until **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2010-0846. All documents in the docket are listed in the Federal eRulemaking portal index

at <http://www.regulations.gov> and are available either electronically at <http://www.regulations.gov> or in hard copy at EPA Region 6, 1445 Ross Ave., Dallas, TX, 75202-2733. To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section. A reasonable fee may be charged for copies.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

Throughout this document wherever “we,” “us,” “our,” or “the Agency” is used, we mean the EPA. Unless otherwise specified, when we say the “San Juan Generating Station,” or “SJGS,” we mean units 1, 2, 3, and 4, inclusive.

**I. Background**

On August 22, 2011, the EPA published a final rule disapproving a portion of the State Implementation Plan (SIP) revision received from the State of New Mexico on September 17, 2007, for the purpose of addressing the “good neighbor” requirements of section 110(a)(2)(D)(i) of the Clean Air Act (CAA or Act) for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS or standards) and the 1997 fine particulate matter (PM<sub>2.5</sub>) NAAQS (the “NM FIP Rule”, 76 FR 52388). In that action, EPA disapproved the New Mexico Interstate Transport SIP provisions that address the requirement of section 110(a)(2)(D)(i)(II)

that emissions from New Mexico sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. We found that New Mexico sources, except the San Juan Generating Station (SJGS), were sufficiently controlled to eliminate interference from those sources with the visibility programs of other states. EPA promulgated a Federal Implementation Plan (FIP) requiring the implementation of nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) emission limits necessary at the San Juan Generating Station to prevent such interference. This FIP also addresses the Regional Haze (RH) Best Available Retrofit Technology (BART) requirement for NO<sub>x</sub> for SJGS. In addition, EPA implemented sulfuric acid (H<sub>2</sub>SO<sub>4</sub>) hourly emission limits at the SJGS, to minimize the contribution of this compound to visibility impairment. Finally, we found that compliance with the NO<sub>x</sub>, SO<sub>2</sub>, and H<sub>2</sub>SO<sub>4</sub> emission limits must be within 5 years of the effective date of our final rule consistent with the requirements of the regional haze regulations.

Petitions for judicial review of the final rule were subsequently filed in the United States Court of Appeals for the Tenth Circuit. The petitioners bringing those challenges are WildEarth Guardians, Public Service of New Mexico (PNM), and New Mexico Governor Susana Martinez with the New Mexico Environment Department.

By a letter to the EPA Administrator, dated April 26, 2012, the Governor of New Mexico requested “a short term (90-day) stay” of the federal implementation plan to evaluate the potential for alternatives to the rule requirements. She presents a stay as being necessary for “meaningful, productive negotiations” that may lead to an avoidance of litigation. By a letter to

the acting Regional Administrator of EPA Region 6, dated May 8, 2012, PNM also requested “an opportunity to engage in productive discussions as proposed by Governor Martinez.”

We support discussions of any alternatives to the federal implementation plan that would be consistent with regional haze rule requirements and the requirements of section 110(a)(2)(D)(i)(II) of the CAA. If such an alternative arises through discussions with the State of New Mexico, as well as other stakeholders, it may provide a basis for submittal by the state of a revised SIP, withdrawal of the FIP, and the resolution of pending litigation.

## **II. Today’s Final Rule**

### **A. Issuance of a Stay and Delay of the Effectiveness of the NM FIP Rule**

Pursuant to section 705 of the APA, the EPA hereby stays the effectiveness of the NM FIP Rule for a period of 90 days from the date of publication of this Federal Register notice. By this action, we are staying the effectiveness of the rule published in the Federal Register on August 22, 2011 (76 FR 52388). This stay of effectiveness will remain in place for 90 days from today. This action adds a note to 40 CFR 52.1628 that there is a 90 day stay of the effectiveness of the NM FIP Rule, but, in its substance, it does not alter any future compliance requirements. There are no compliance obligations under the terms of the NM FIP that arise during the 90 day period.

Under section 705 of the APA, “an agency . . . may postpone the effective date of [an] action taken by it pending judicial review.” This source of authority requires an Agency finding

that “justice requires” a temporary stay of rule requirements. Accordingly, as groundwork for the mentioned discussions among the Agency, the State of New Mexico, and other stakeholders, EPA now finds that justice requires a 90-day stay of the rule’s effectiveness. Our temporary stay of the effectiveness of the NM FIP Rule applies only to any requirements established in 40 CFR 52.1628 during the 90-day stay and does not extend the ultimate compliance timeframe set out in the rule, which is a statutory requirement under CAA section 169A(b)(2)(A). Nevertheless, EPA intends to undertake a future rulemaking to either: 1) extend the compliance time for the NM FIP to accommodate the stay; or 2) account for an alternative proposal. If the discussions of new alternatives lead to an additional regulatory proposal, the public would have the opportunity to evaluate and comment on such new proposal through EPA’s rulemaking process.

## **B. Basis for Making This Action Effective on the Date of Publication**

The EPA also believes that there is good cause to make today’s action effective immediately, rather than effective within 30 days, within the meaning of 5 U.S.C. 553(d)(3). One purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final action takes effect. Whereas here, the affected parties are anticipating this action and requesting the flexibility it provides, and any delay in its effectiveness will result in unnecessary delays for productive negotiations. Therefore, balancing the necessity for immediate implementation against principles of fundamental fairness, which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of this action, EPA has determined that it is unnecessary,

impracticable and contrary to the public interest to delay this action. Additionally, since this action does not “implement, interpret, or prescribe law or policy,” within the meaning of 5 U.S.C. § 551(4), nor makes changes to substantive requirements, EPA concludes that it does not constitute a substantive rulemaking. Therefore, it is not subject to notice and comment requirements.

### **III. Statutory and Executive Order Reviews**

#### **A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563**

This action will stay the effectiveness of the NM FIP for 90 days and imposes no additional requirements. This type of action is exempt from review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011).

#### **B. Paperwork Reduction Act**

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Under the Paperwork Reduction Act, a “collection of information” is defined as a requirement for “answers to . . . identical reporting or recordkeeping requirements imposed on ten or more persons . . . .” 44 U.S.C. 3502(3)(A). Because the temporary stay is for the effectiveness of a rule that applies to a single facility, (SJGS), the Paperwork Reduction Act does not apply. See 5 CFR 1320(c).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for our regulations in 40 CFR are listed in 40 CFR Part 9.

### **C. Regulatory Flexibility Act**

This action is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This action is not subject to notice and comment requirements under the APA or any other statute because, although subject to the APA, this action does not “implement, interpret, or prescribe law or policy,” within the meaning of APA § 551(4).

#### **D. Unfunded Mandates Reform Act (UMRA)**

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 for State, local, or tribal governments or the private sector. EPA has determined that this temporary stay does not contain a Federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of \$100 million by State, local, or Tribal governments or the private sector in any 1-year. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action stays the effectiveness of the NM FIP for 90 days and imposes no additional regulatory requirements.

#### **E. Executive Order 13132: Federalism**

This temporary stay does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action merely temporarily stays the effectiveness of a final rule. Thus, Executive Order 13132 does not apply to this action.



## **F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments**

EPA will consult and coordinate with Tribes regarding BART alternatives during the stay, however, this temporary stay does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it neither imposes substantial direct compliance costs on tribal governments, nor preempts tribal law. Furthermore, this action does not “implement, interpret, or prescribe law or policy,” within the meaning of 5 U.S.C. § 551(4), and therefore, it does not constitute a substantive rulemaking. As such, this action only grants a 90-day stay of the effectiveness of the NM FIP Rule without altering any future established compliance requirements. Therefore, the requirements of section 5(b) and 5(c) of the Executive Order do not apply to this action.

## **G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks**

This temporary stay is not subject to Executive Order 13045 because it is not a rule of general applicability, it is not economically significant as defined under Executive Order 12866, and does not have a disproportionate effect on children.

Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be economically significant as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate

effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

#### **H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use**

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

#### **I. National Technology Transfer and Advancement Act**

This temporary stay is not subject to the National Technology Transfer and Advancement Act of 1995 (“NTTAA”). Section 12(d) of the NTTAA, Public Law 104–113, 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### **J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations**

This temporary stay is not subject to Executive Order 12898. Executive Order 12898 (59 FR 7629, February 16, 1994), establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not change the substance of 40 CFR 52.1628.

#### **K. Congressional Review Act**

This action is not subject to the Congressional Review Act (“CRA”). The CRA, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996,

generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Section 804 (3) of the CRA defines "rule" as having the same meaning given to such term in section 551 of the APA. *See* 5 USC § 551(4). Since this action is not designed to implement, interpret, or prescribe law or policy, within the meaning of APA, this action is exempted from the reporting requirements of the CRA.

**List of Subjects:**

Environmental protection, Air pollution control, Best available control technology, Incorporation by reference, Intergovernmental relations, Interstate transport of pollution, Nitrogen dioxide, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide, Visibility.

Dated: July 2, 2012

Lisa P. Jackson,

Administrator.

Title 40, chapter I, of the Code of Federal Regulations is amended as follows:

**PART 52 – [AMENDED]**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

2. Effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, 40

CFR 52.1628 is stayed until **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**..

~~[FR Doc. 2012-16952 Filed 07/13/2012 at 8:45 am; Publication Date: 07/16/2012]~~